

## APPEAL NO. 93338

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et. seq.* (Vernon Supp. 1993 (1989 Act)). On April 5 and 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues announced and agreed upon were:

1. Whether claimant sustained an injury to his back in the course and scope of his employment on (date of injury);
2. Whether claimant reported a back injury to his employer within 30 days of (date of injury), the date of the alleged injury.

The hearing officer determined that the appellant, claimant herein, was not injured in the course and scope of his employment and that claimant, without good cause, failed to notify his employer of his alleged injury within 30 days.

Claimant disputed certain findings of fact as being contrary to claimant's version of what happened, arguing that he had initially trivialized his injury ("did not realize that it would escalate into such a major injury (requiring surgery)"). Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

## DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was employed as a heavy equipment operator by and Maintenance, employer, on (date of injury) (the Thursday before Memorial Day) cleaning a job site. According to claimant, he was injured as he and a coworker, (SM), were lifting pipe over the side rails of a flat bed truck. Several witnesses testified as to the size of the pipe in question. The hearing officer found the pipe to be 5/16" thick, 10" or 12" in diameter in lengths of 1' to 3' long with the maximum weight being approximately 45 pounds. This is not disputed by claimant. Claimant testified that as he was lifting a particular piece of pipe he heard his back "pop" and that he "hollered" and told SM he had hurt himself. Claimant also testified that (RB), a fellow worker who was on break, came up and asked what happened and that claimant told him of his injury. Claimant stated that he worked the rest of the day, and then spent the four day Memorial Day weekend resting and using a heating pad on his back. Claimant states he returned to work on the following Tuesday, May 26th, at which time he contends he told (Mr. S), employers' project manager, that he had hurt his back but asked Mr. S not to report it. Claimant also contends he told (Ms. H), employer's timekeeper about the injury and Ms. H recommended a chiropractor. Claimant went to (Dr. B), M.D., on May 27, 1992 (all dates are 1992 unless otherwise noted), for a sinus problem (headaches) and claimant asserts he told Dr. B of his back problem at that time. According to claimant Dr. B did not treat his back or make a record of the back injury because he told her he was going to have a

chiropractor look at it. Claimant continued to work for the employer until September 14th, when he was laid off because the job was almost finished and the heavy equipment he had been operating had been moved. Between May and September claimant worked regularly except for June 3rd and June 9th, when he went to the (UTMB), (city), about groin and prostate problems. Several witnesses testified, and claimant admitted on cross-examination, that there were daily safety meetings, that claimant had signed safety slips that informed the workers of the requirement to report any injury immediately and that claimant had not noted any injuries on May 21st, 26th, or 27th. Claimant agreed that his first report in writing regarding his injury was on October 8th, three weeks after he had been laid off and 5½ months after the pipe incident. Claimant's wife testified that claimant had not had any previous back injuries and that he told her about his back injury as soon as he got home on May 21st.

RB, a coworker, testified that he was in the claimant's general vicinity on a smoke break at the time of the alleged injury. He agreed he spoke briefly with claimant and that claimant complained about his back hurting. RB is vague on whether claimant stated that he injured his back at work. RB is presently unemployed.

SM testified his position was a "1st class helper" and he was working with claimant at the time of the alleged injury. SM firmly testified he did not see claimant injure himself and that claimant had not told him that he had been injured. This directly contradicted claimant's testimony. SM is presently unemployed.

Mr. S, employer's project superintendent, testified and categorically denied that claimant had ever reported an injury to him. This also directly contradicted claimant's testimony.

Ms. H, the timekeeper, testified and denied claimant had ever told her that he had a job-related injury. She testified that sometime in May she saw claimant limping and asked about it. Ms H is somewhat vague regarding exactly what was said other than she was adamant that claimant had not reported an injury because she had not completed an accident report. According to Ms. H, she had previously had some back problems and she recommended a chiropractor to claimant. Ms. H testified, as did several other witnesses, that she is the person who handles accident reports. Ms. H said she first had knowledge that claimant was making a workers' compensation claim in September or early October.

(Mr. C), employer's construction manager, testified he was on the job site and was claimant's supervisor in May. Mr. C denies that claimant ever told him that he was injured at work. Based on both Mr. C's and claimant's testimony, Mr. C had spent some time at claimant's house, and Mr. C and claimant had a disagreement over Mr. C's car that claimant was working on. On one occasion (it is not clear whether it was the Memorial

Day weekend or another time) Mr. C said he asked claimant about his back and, according to Mr. C, claimant told him his back was "locked up" and that it had happened before. Mr. C said he asked claimant if there was anything he, Mr. C, should know about claimant's back and claimant had said "no." After Mr. C testified, carrier attempted to call (EM), a coworker, as a witness even though he had not been listed as a witness by carrier. Claimant objected and carrier disclosed it had just that morning been apprised that claimant had allegedly offered EM money to testify. The hearing officer recessed the hearing for five days to allow the parties to interview and prepare for EM's testimony. The hearing was reconvened on April 9, 1993, and EM testified that he was a pipe fitter helper but was currently not employed. He stated that he had been in the general vicinity, on the same job site, as claimant on May 21st. EM stated he did not see claimant injure himself but conceded he was doing his own job and did not observe claimant at all times. EM testified that claimant had on three occasions asked him to testify that claimant had been injured at work. EM stated he had made no response and claimant finally stopped asking him. EM specifically stated that claimant did not ask him (EM) to lie and allowed for the possibility that claimant might have thought that he knew something about the back injury. EM testified that when he saw claimant and SM loading pipe, they were loading it in the tailgate rather than over the side rails as claimant had testified. Both EM and claimant agree they had been friends at one time and that EM had been building a barbecue oven at claimant's house. Claimant testified that EM had asked to borrow money. EM denied this and alleged that claimant had suggested that he would give EM 10% of any recovery if EM would testify. Claimant denied that allegation.

Claimant submitted medical records of (Dr. D), a chiropractor. Those records show treatments on 5/29, 5/30, 6/1, 6/2, and 6/3 for back pain. Dr. D gave claimant a medical excuse slip for 5/29 through 6/3.

Medical records of Dr. B were introduced. A registration information form indicates no workers' compensation claim. The progress notes indicate "back problems" on 5/27/92, complaints of "back muscle spasms" on 5/28/92, and "c/o (complains of) radiculopathy [R] leg" on 5/29/92. No further notations regarding the back were made until "10-20-92 Pt called wanted muscle relaxer & pain pills . . . refused." Dr. B saw claimant on 10-20-92 for "pain ↓ back Rt Hip & Rt leg." By letter to claimant's attorney dated March 17, 1993 Dr. B states:

[Claimant] was seen by me in Clinic on May 27, 1992 for a work-related injury. The fact that it was work-related was not mentioned due to the fact that he did not plan to charge this through Workman's Compensation, but he did state that his back was injured on the job. We also did not realize how severe the injury was initially, and did not anticipate further services.

Claimant also submitted medical records from UTMB. The records show a

herniated disc which was operated on in January 1993. An entry dated 11-22-92 states "pain started (on or about) last May & became much worse (on or about) 6 wks ago. Pt reports he had MRI (on or about) 5 wks ago which showed slipped disc @ L4 Herniated disc @ L5." The MRI of the lumbar spine on 10-21-92 reports "a centrally and right-sided herniated nucleus pulposus is seen at the L5-S1 level which compresses the thecal sac and right S1 nerve rootlet."

The hearing officer found in pertinent part:

### **FINDINGS OF FACT**

- 5) On (date of injury), the date of the alleged injury, claimant was engaged in clean-up of his employer's job site. This entailed picking up pipe.
- 6) At the time of the alleged injury claimant and a co-worker were lifting a joint of 5/16", 10" or 12" pipe which was 1' to 3' long.
- 7) The 12", 5/16" pipe which claimant and co-worker were lifting weighs 14 to 15 pounds per foot. The maximum weight they were lifting was approximately 45 pounds.
- 8) Claimant did not tell his co-worker he had been injured.
- 9) Claimant did not tell [RB] that he had injured his back in a job-related incident.
- 10) Claimant did not report his alleged injury to the timekeeper of the employer or to anyone in a supervisory or management position.
- 11) Claimant was aware of the requirement that accidents and injuries be reported immediately. Claimant told his chiropractor to not report his complaint as a Workers' Compensation claim. He did not report his visit to [Dr. B] as a Workers' Compensation claim.
- 12) Claimant worked a normal work schedule from the time of his alleged injury until he was laid off on September 14, 1992, missing only those days required to deal with the medical problems centered about his groin and prostate.

### **CONCLUSIONS OF LAW**

- 2) Claimant was not injured in the course and scope of his employment with [employer].

3) Claimant, without good cause, failed to notify his employer of his alleged injury within 30 days.

Claimant, who was pro se on appeal, challenged those findings and conclusion that would indicate he had not sustained an injury on the job and had not reported it. The carrier suggests, in its response, some of claimant's early back problems, ". . . pain and limping was in fact related to a prostate and groin area problem . . . ."

The parties acknowledged at the CCH that the issue would boil down to one of credibility, with claimant alleging an on-the-job injury and carrier's witnesses disputing that fact. The hearing officer at the CCH and in his discussion correctly stated that the burden is upon the claimant to establish that his back condition was a result of an accidental injury which occurred while he was engaged in the employer's business and that claimant had reported his injury to the employer within 30 days unless good cause existed for not doing so. See also Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). The hearing officer goes on to state in his discussion: "[a]side from [claimant's] testimony, there is absolutely no evidence to support claimant's burden." We would note that while the injured party's testimony alone may be enough to satisfy the claimant's burden of proof (Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991), claimant's testimony is that of an interested party, and only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App. - Amarillo 1973, no writ). We have held that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and Appeal No. 91013, *supra*. The hearing officer may accept some parts of a witness' testimony and reject other parts. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App. - Fort Worth 1947, no writ). The hearing officer cites the facts that SM, claimant's coworker, denies that claimant was injured; that RB, a witness called by claimant, testified only that the claimant was complaining of his back hurting; and that all of the employers witnesses, Mr. S, Mr. C and Ms. H "specifically denied [claimant] had reported any work related injury." Claimant conceded he was aware of the requirement to report all incidents and nonetheless signed safety slips for the days in question showing no injury. The hearing officer notes in his discussion that Dr. B's reports ". . . did not mention that the back condition was work-related because the claimant did not intend to process it through the Workers' compensation system. It is unlikely he would tell doctors to not report the condition but tell his employer."

From our review of the record, we find that the hearing officer's decision is supported by sufficient evidence. We would reverse the decision of the hearing officer only if we were to find, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Employers Insurance Association v. Alcantra, 764

S.W.2d 865 (Tex. App. - Texarkana 1989, no writ); In re Kings Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951); and Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

We conclude that the evidence is sufficient to support the hearing officer's decision and affirm.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Lynda H. Nesenholtz  
Appeals Judge